

Working Paper

IMPLEMENTATION OF USAID PROGRAMS IN NON-PRESENCE
COUNTRIES BY NONGOVERNMENTAL ORGANIZATIONS
(See Footnote No. 1)

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Franchise Working Group

Footnote No. 1 - For the purposes of this paper, the term "NGO" encompasses the whole of the private sector and includes for-profit firms, universities, private voluntary organizations, and other nonprofit entities.

IMPLEMENTATION OF USAID PROGRAMS IN NON-PRESENCE COUNTRIES BY
NONGOVERNMENTAL ORGANIZATIONS

1. Summary

The Franchise Working Group has reviewed possibilities for expanding USAID's partnership with nongovernmental organizations (NGOs) through an expanded role in program implementation. The Agency is planning to reduce or remove entirely its direct-hire presence in several countries where the U.S. Government has a continued interest in maintaining a development assistance program. The working group is charged with analyzing the possibilities for the private sector implementation of USAID country programs through various arrangements. This work is consistent with reengineered program operations and the Agency's efforts to strengthen its ties with the NGO community, such as the New Partnership Initiative recently announced by the USAID Administrator.

The working group is able to recommend that a part of the Agency's strategy for maintaining programs in non-presence countries consist of country programs managed entirely by NGOs under contract or assistance arrangements (grants and cooperative agreements). The establishment of a new and expanded relationship with NGOs is endorsed. This new relationship is defined by an empowerment of private sector entities to undertake USAID

development initiatives in countries where no Agency employee may be stationed.

As is now the case, programs may consist of activities which are part of a strategic objective (SO), or an entire SO in some countries. The difference lies in the degree of authority the NGO is expected to exercise over the implementation process. The NGO will agree to achieve specific results and within the "set of results" that comprise the program, it is envisioned the NGO will act as USAID's primary technical representative in the cooperating country. Within the scope of the contract or assistance arrangement, the NGO will exercise considerable discretion over the management of activities, and it will be able to decide which intervention, or set of interventions, is most effective and to make funding allocation choices accordingly.

This relationship is founded on existing development experiences, and in many respects it mirrors arrangements which the Agency has established in many different countries through the years. The Agency's extensive reengineering of its core business functions is based, in large part, on "best practices," and this initiative is very similar in inspiration.

It is important to note that this new relationship will not be reflected in all Agency initiatives, given that in some countries USAID programs may be implemented in a more traditional fashion. This is particularly true in humanitarian assistance and food aid activities.

In describing the relationship with NGOs that the working group endorses, it is felt that the term "franchising," while stimulating innovative thought regarding outsourcing and privatization possibilities, may pose an obstacle in that different interpretations of the word may give rise to widely differing expectations. Therefore, with respect to USAID's reengineered program operations, this relationship with the NGO community can also be described as a "strategic partnership" and program implementors can also be referred to as "strategic partners." Therefore, for sake of clarity these terms are used below, rather than the terms "franchise" and "franchisee."

The working group recommends that a series of program approaches be developed to use as models for USAID programs in non-presence countries. Recognizing that one implementation approach is not suitable for the Agency's many, varied development assistance initiatives, the identification of a set of approaches to guide the structuring of several different types of country programs should be undertaken. It is assumed that all of these approaches will have in common certain key characteristics:

- o strategic partnerships initially will be established in selected non-presence countries with programs consisting of a single SO,
- o USAID will define the strategic partnership by identifying programmatic objectives and developing a results framework in close consultation with customers, stakeholders, and partners,

- o a strategic partner will be identified through a competitive process, and the contract or assistance instrument will be executed for the attainment of a set of results (in some countries at the SO level),

- o the strategic partner will be expected to achieve specific

results through the development and management of appropriate interventions, as detailed in the results framework, and

- o the strategic partner will provide the Agency with technical representation in the cooperating country through its program activities and through official interactions with the cooperating country government, consistent with the terms of its contract or assistance instruments with USAID.

Certain functions are considered to be inherently governmental and may not legally be performed by private individuals. The conduct of "foreign policy," for example, is not delegable to individuals or entities outside the Executive Branch. Our strategic partners, therefore, will not conduct business in the behalf of USAID that lies outside their specific area of technical expertise and the scope of program activities detailed in the scope of the contract or assistance instrument.

Under the strategic partnership arrangement, USAID will develop a program implementation plan for each non-presence country, and a USAID official -- stationed in Washington, a regional hub, or a neighboring mission -- will be responsible for monitoring implementation and for tracking results. In all events, the Agency retains full accountability for appropriated funds and for approving the use of resources, to include the identification of causal relationships, program approaches, costs, and magnitude of programmatic results.

2. Strategic Partnerships

In considering the need of the Agency to develop new and different operating modalities, the working group looked closely at the nature of the relationship between USAID and the range of entities with which it does business and shares responsibilities. The roles of USAID, NGOs and the Department of State were examined with an eye toward developing a comprehensive strategy for implementing programs with fewer USAID personnel overseas.

The existing relationship with the Department of State is considered to be sufficiently flexible to accommodate a wide range of program implementation modalities. To strengthen this relationship it is recommended that USAID negotiate an MOU with the Department of State as an integral part of the program implementation plan in every non-presence country. The MOU should specify the role and responsibilities of the Ambassador and his staff, the implementing NGO, and the USAID program

manager. The MOU is particularly essential in instances where it is determined the Department of State should manage a program, provide on-the-ground oversight, formally represent the Agency, or otherwise play a substantive, continuing role in the implementation of a country program. USAID and the responsible ambassador should negotiate and agree on the nature and level of the embassy's involvement.

USAID has been ascribed specific public policy functions that may not be relinquished on a widespread basis. The Agency cannot redefine its fundamental role and relationship with the State Department and other government entities. Authority for making these decisions lies exclusively with the Administration, in consultation with Congress. In establishing new strategic partnerships, the Agency deliberately and specifically reserves to itself core program operations functions, to include (a) country and beneficiary selection, (b) determination of strategic objectives (SOs) and expected results, and (c) program evaluation. The working group, therefore, has focused on private sector program implementation and on the use of assistance instruments to implement programs. These program implementation services are best acquired from independent strategic partners within the NGO community with interests that are common and convergent with USAID's.

It is expected that USAID's strategic partners will take several different forms and will have differing capacities and strengths. However, the working group has identified certain characteristics that it would expect -- to varying degrees -- in all program implementors in non-presence countries. These characteristics include:

- o independent objectives which are convergent with USAID's development goals and objectives;
- o adequate administrative and financial management capacities, as demonstrated through established administrative accounting resources and procedures;
- o technical leadership capacity in the relevant development sector;
- o country-specific knowledge and experience (but not necessarily established in-country operations); and
- o independent support and resources, as demonstrated through additional funding and program-leveraging.

Program implementation is the focus of the new relationship described by the working group, and the strategic partnership contemplates collaboration in implementing programs to an extent unprecedented in the Agency. To establish a strategic partnership, USAID first would approve a set of objectively verifiable results to be achieved in a cooperating country. Following the appropriate agreement between USAID and the cooperating country (e.g., memorandum of understanding or strategic objective agreement), proposals would be requested from NGOs able and willing to manage program implementation. In their proposals NGOs would give details about how they would achieve intermediate results leading to

the objective, in cooperation with cooperating country institutions and customers and using both USAID's and their own resources. The strategic partnership is established when a contract, grant, or cooperative agreement is awarded to an organization to implement the program.

USAID employees would monitor and evaluate program oversight performance, and if necessary revise the SO and expected results in consultation with the NGO, other partners and customers. The precise role and location of USAID staff may vary in each situation, but it is important to note here that programs in non-presence countries will require the dedication of USAID staff (direct hire and nondirect hire) for program implementation, both in the field and in Washington.

A range of instruments are available to establish a strategic partnership. A cooperative agreement (CA), grant, or contract are all mechanisms likely to be used. The relationships between the NGO, USAID, stakeholders, customers and partners are defined by the results identified -- by what we hope to achieve in the cooperating country. The choice of assistance instruments is then driven, in turn, by specific programmatic requirements and operating conditions.

Regardless of the specific instrument chosen, the Agency expects its partners to share accountability for results. Inherent in the concept of partnership is an element of risk that has not marked USAID's relationship with the NGO community in the past. The Agency has adopted a results orientation in its program operations, and annual funds allocation decisions are based increasingly on how successful programs are in achieving their stated goals. Strategic partnerships would be subject to the same funding constraints USAID mission programs currently face, e.g., meeting annual earmark and other funding targets.

Results are reviewed formally by the Agency on an annual basis, and the responsible USAID program manager will prepare a results review and resource request (R4), after appropriate consultation with the strategic partner. The R4 is submitted to USAID for review and approval as a basis for continued program operations. Similarly, the USAID program manager has responsibility for monitoring the work of the strategic partner on a regular basis and for evaluating the program and the results that have been achieved.

3. U.S. Government Activities That May Not Be Privatized

General

OMB Circular A-76 describes "inherently governmental function", or "IGF." that may not be performed by NGOs. Circular A-76 categorizes IGFs in two basic groups:

1. Monetary transactions and entitlements, including:
 - > tax collection and revenue disbursements;
 - > control of treasury accounts and money supply; and
 - > administering public trusts

2. Any act of governing (this means the discretionary exercise of government authority), including:
 - > criminal investigations, prosecutions and other judicial functions;
 - > management of government programs requiring value judgments;
 - > management and direction of the Armed Services;
 - > activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role;
 - > conduct of foreign relations;
 - > selection of program priorities;
 - > direction of Federal employees;
 - > regulation of the use of space, oceans, navigable rivers and other natural resources;
 - > direction of intelligence and counter-intelligence operations; and
 - > regulation of industry and commerce, including food and drugs.

Judgements in Identifying Inherently Governmental Functions

1. Does the function involve the interpretation and the execution of the laws or policies of the United States?
2. Does the function involve the determination of policy and the direction and control of Federal employees?
3. Examine the exercise of discretion:
 - > if the exercise of discretion has the effect of committing the Federal Government to a course of action, it is the act of governing and cannot be privatized.
4. Look to the totality of the circumstances when deciding whether privatization has effected or might effect a transfer of official responsibility:
 - > Congressional restrictions or authorizations;
 - > the degree to which official discretion is limited or extinguished, i.e., whether the contractor's involvement in basic agency functions is so extensive that the agency's ability to develop and consider options other than those provided by the contractor is restricted;
 - > the degree to which contractor activities may involve wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures;
 - > the degree to which agencies have effective management procedures and policies that enable meaningful oversight of contractor performance, the

resources available for such oversight, and the actual practice of the agency regarding oversight.

5. Certain services and activities may not in and of themselves be considered IGFs, but may approach that category because of the way in which the contractor performs the contract or the manner in which the USG administers contractor performance. When contracting for such requirements, additional control measures should be considered, including:
 - > development of carefully crafted statements of work and quality assurance plans;
 - > establishment of an audit plan for periodic review of such contracts by government auditors;
 - > conducting pre-award conflict of interest reviews to ensure contract performance is in accordance with objective standards and contract specifications; and
 - > physically separating contractor personnel from government personnel at the work site.

Illustrative List of Inherently Governmental Functions in the Foreign Assistance Area

1. USAID activities which would not be considered IGFs:
 - > implementing a bilateral assistance agreement;
 - > bookkeeping;
 - > certifying the availability of government funds for a particular project;
 - > disbursing earmarked funds;
 - > billing and receiving;
 - > personnel functions at the contractor and subcontractor level.
2. USAID activities which would be considered IGFs:
 - > negotiating a bilateral assistance agreement between USAID and a recipient country;
 - > awarding a USAID contract;
 - > signing a USAID contract;
 - > negotiating assistance agreements;
 - > determining the substance and application of regulations, or interpreting or evaluating federal policy directives;
 - > determining USAID program priorities, including country/beneficiary selection and sector selection;
 - > monitoring performance of contractors;
 - > conducting bidding on contracts;
 - > evaluating bids;
 - > administering a USG contract (including the order of changes in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or

services).

4. Representation of the Agency by Strategic Partners

The working group recommends that "representation" of the Agency by its strategic partners be defined as:

1. Public affiliation with USAID and the appropriate acknowledgement of USAID funding and sponsorship, such as displaying logos on all USAID-financed commodities and providing other appropriate publicity, as is now required.
2. The exercise of technical leadership and influence through the demonstration of specialized expertise and capacity in program implementation activities and through discussions with development stakeholders, customers, and partners (including the host country government) on program-specific issues within the terms and conditions of the contract or assistance instrument.
3. Programmatic presentations and/or the backstopping of official visitors and delegations; responses to ad hoc reporting requirements; or other services as agreed by the partners.

Extraordinary representational requirements, such as the handling of official USAID visitors and presentations to congressional delegations (CODELs) at the request of the Department of State, may be handled by the USAID program manager in consultation with the grant or contract officer, the responsible ambassador, and the strategic partner. Where cooperative agreements or contracts do not contain specific provisions, the additional costs incurred by the strategic partner may be reimbursed, as appropriate.

Representation will not include requiring a strategic partner to identify itself as a part of USAID. A strategic partner will not be obliged to utilize the USAID letterhead, for example, or to otherwise operate in a manner which would blur the distinctions between itself and the U.S. Government. Due largely to legal considerations, it is the consensus of the working group that NGOs not be required to represent the Agency in a manner that would confuse the discrete governmental or corporate identity of each.

Strategic partners are expected to provide for the technical representation of USAID and to enter into discussions with the host government about development assistance activities within defined parameters -- discussions that fall within the scope of their agreement. Such representations are expected to be limited to the technical area, the USAID results framework, and the specific set of results which is being implemented by the strategic partner in the non-presence country. The instrument (grant, cooperative agreement or contract) should specify what latitude and authority is to be exercised in this regard. On a case-by-case basis, strategic partners may act as a formal "mailbox" or information conduit for USAID on a cost-reimbursement basis.

5. Program management approaches

The Agency is seeking pragmatic, sensible arrangements with NGOs that will allow it to undertake development programs in countries where an official presence is not maintained but where programmatic interests continue. In these instances USAID needs to undertake programs at arms length and expend funds without exercising direct day-to-day oversight. While this need is not now new, it has intensified.

Through the years the Agency has garnered considerable experience in this area, and a number of possible development approaches have emerged. These approaches -- modified to reflect the principles of the strategic partnership detailed in section 1 of this paper -- represent a range of models from which USAID management can select the most appropriate.

Significant achievements have been made in prior years, and the NGO community represents a powerful resource for the Agency. However, in considering different ways to handle USAID programs in the future, it is essential that we also learn from errors and to allow past problems to inform today's decision-making process.

Whenever feasible, it is the Agency's preference that its employees be stationed in the cooperating country and be directly involved in program implementation. The Agency imposes a rigor and discipline in program development, implementation and evaluation that has recently been significantly enhanced through a concerted reengineering of USAID's core business areas. Therefore, there is a body of knowledge to suggest that running a USAID program without an in-country, professional development staff -- with a strong and broad USG perspective to help in planning, achieving, and judging the program -- is a second best solution. When USAID employees cannot be deployed to directly manage programs, the following vulnerabilities must be considered:

- o lessened program accountability and lessened results,
- o weakened financial management controls and funds accountability,
- o less bilateral and policy reform dialogue with the cooperating country government, and
- o weakened USG representation and cross-sectoral discourse on development issues.

These concerns help to frame a greater collaboration between the U.S. Government and the private sector, and they represent issues and challenges that must be addressed in building a strategic partnership. The success of this initiative must be judged, in large part, by how effectively these questions are answered.

6. Next steps

1. Consult the Non-Governmental Organizations (NGOs).

2. Continue the review of applicable USAID programming experiences and analysis of possible conflicting interests inherent between private sector performance of technical work in a "strategic partnership" and mandated competition requirements for contract and grant awards.
3. Identify the country programs where opportunities exist for strategic partnerships, with particular emphasis on newly graduating and close-out countries, given that the greatest opportunity for partnership initiatives appear to lie in the countries designated for close-out.

7. Participants of the Working Group

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